Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM - 1979

NO. 79-999

FLORIDA EAST COAST RAILWAY, PETITIONER

vs.

DEPARTMENT OF REVENUE, STATE OF FLORIDA

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF FLORIDA

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Petitioner makes this its reply to the Brief in Opposition to Petition for Writ of Certiorari filed in this cause by the Attorney General of Florida.

RESPONSE TO ARGUMENT OF RESPONDENT

Respondent attempts to contest Petitioner's statement that no other railroad in Florida was assessed the sales and use tax for the period during which Petitioner was taxed. Yet, the testimony of the Department of Revenue's own witness established:

1. That witness was the supervisor of the special audit section for Northeast Florida and had held such position for 17 years.

2. His duties included the conduct of audits for the enforcement of the Florida sales and use tax.

That witness testified as follows, upon questioning by counsel for the FEC:

> Q. Within your knowledge, has this tax been imposed against any other railroad?
>
> A. No.

That witness further testified concerning this issue as follows:

> Q. So that so far as you know for years 1971 through 1976 at least this tax has not been imposed against anybody else?
>
> A. So far as I know.

Respondent has presented no evidence to indicate that any other railroad operating within Florida has ever paid a sales and use

tax on the type of transactions for which Petitioner has been assessed and has paid a tax in excess of $200,000.

As anticipated by Petitioner, Respondent cites and relies heavily upon this Court's opinion in Lewis K. Liggett Co. v. Lee, 288 U.S. 517, 53 S. Ct. 481, 77 L. Ed. 929 (1933). That case is authority for the proposition that where an adequate state remedy exists to correct a discriminatory enforcement of a taxing statute, then the federal courts will not find a violation of the Equal Protection Clause of the Federal Constitution. The critical point made in Liggett, and ignored by Respondent, is that Petitioner does not have any adequate state remedy, for the simple reason that any suit by Petitioner to force the state to equitably apply the taxing statute has been barred by the applicable statute of limitations.

Respondent suggests that Petitioner could have instituted such a suit in 1975, when

Petitioner was served with the first notice of assessment. However, it is difficult to understand how Petitioner would have been in a position to file such a suit in 1975, when Petitioner first learned of the discrimination against it during the testimony of Mr. McCrone in December of 1977. And, of course, by December of 1977, the applicable statute of limitations had expired.

Further, Respondent ignores this Court's clear holding in Hillsborough Township v. Cromwell, 326 U.S. 620, 90 L. Ed 358 (1946), in which this Court stated:

> The constitutional requirement, however, is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class.
> 326 U.S. at 623, 90 L. Ed. at 363.

CONCLUSION

Respondent presents no evidence which refutes Petition's position that Petitioner and only Petitioner has been assessed and has paid a sales and use tax for the period from 1971 through 1974. Respondent's suggestion that Petitioner showed a lack of diligence in pursuing its available state remedies is without merit as any alleged state remedy was barred by the statute of limitations prior to Petitioner becoming aware of the discrimination against it. Accordingly, Petitioner has been denied its right to equal protection of the laws, and Petitioner respectfully prays that the

relief requested in its initial Petition for Writ of Certiorari be granted.

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